
U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: July 20, 1988
CASE NO.: 88-ERA-34

In the matter of

ROGER WENSIL,
Complainant,

v.

UNITED STATES DEPARTMENT OF ENERGY,

ADMINISTRATOR, WAGE & HOUR DIVISION,
UNITED STATES DEPARTMENT OF LABOR,

E.I. du PONT de NEMOURS & COMPANY,

BLOUNT BROTHERS,

B. F. SHAW COMPANY,
Respondents,

ORDER OF DISMISSAL

Statement of the Case

On June 21, 1988, complainant, Roger Wensil, by his counsel, Stephen M. Kohn, Michael D. Kohn, and David K. Colapinto, filed an appeal with the Chief Administrative Law Judge, DOL, alleging that the Wage and Hour Division of the U.S. Department of Labor (DOL) had constructively denied relief in the Claimant's action against the named Respondents filed on September 8, 1987. Filed pursuant to the Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (Act), and 29 C.F.R. SS24.5, the appeal alleges that the Wage and Hour Division has not complied with 29 C.F.R. §24.4(d)(1), which requires the

Administrator of the Wage and Hour Division to investigate a complaint and give notice of the determination within thirty days.

[Page 2]

The complaint filed on September 8, 1987, a copy of which. was annexed to Claimant's request for a hearing, alleged that the Complainant, an employee of B.F. Shaw Company (Shaw) at the Department of Energy (DOE) Savannah River Plant, was constructively discharged by Shaw on September 4, 1987, after being subjected to intimidation and harassment by Shaw employees with the complicit or explicit consent of DOE. Shaw, a subsidiary of Respondent Blount Brothers, is a subcontractor of Respondent E.I. du Pont de Nemours & Company (du Pont), the contractor for DOE's Savannah River Plant.

A Notice of Hearing was issued on July 7, 1988 setting July 19, 1988, as the date for the requested hearing. Subsequently, on July 13, Respondent DOE filed a Motion To Dismiss for Lack of Jurisdiction and a Motion to Dismiss DOE as a party. Respondent du Pont filed a Motion To Dismiss on July 14, and requested a continuance of the hearing to allow a ruling on the motion prior to the hearing. Respondents Shaw and Blount Brothers also filed a Motion To Dismiss the Complaint on July 14, and requested a continuance for the same reason. All of the Respondents motions contend, in substance, that DOL does not have jurisdiction over the complaint under Section 210 of the Act. They contend that the statute does not grant DOL jurisdiction over DOE facilities because they are not licensed by the Nuclear Regulatory Commission (NRC).

Claimant filed an opposition to the motions on July 19. That pleading asserts, in substance, that DOE employees such as the Complainant are entitled to protection administered by DOL under a Congressionally created uniform system for dealing with environmental whistleblower complaints under seven enumerated environmental statutes with employee whistleblower provisions. Claimant asserts that DOE has conceded that it is subject to certain of those statutes and that section 210 was modeled after certain them. Claimant asserts, in effect, that DOE is covered by section 210 of the Act because DOE's separate whistleblower protections under DOE Order 5483.1A are ineffectual and unworkable. He also asserts that he is entitled to, and has not waived his claim to, a timely final agency decision by the Secretary of Labor within ninety days pursuant to 42 U.S.C. § 5851(b)(2)(A).

[Page 3]

29 C.F.R. §24.5(e)(4)(ii) provides that in cases such as this where a dismissal of a claim or party is sought, the Administrative Law Judge shall issue an order to show cause why the dismissal should not be granted and offer all parties a reasonable time to respond. In this case, all Respondents have requested dismissal for lack of subject matter jurisdiction, and have served the Claimant, who has responded. Thus, since an order to show cause would in this case be a superfluous procedural step, it may, in the absence of

objection, be omitted without prejudice to any party. All parties were given timely notice by telephone that the hearing would not be conducted as scheduled.

Discussion

The several Motions and supporting materials, and the records of this office, of which I take official notice, disclose that this Complainant has filed two prior complaints and appeals relative to his employment at DOE's Savannah River Plant. In each case a different Administrative Law Judge concluded that the complaint should be dismissed for lack of subject matter jurisdiction. One of those cases was consolidated with that of a co-complainant similarly situated. That co-complainant filed a separate complaint which was also dismissed for lack of jurisdiction by another Administrative Law Judge on essentially the same rationale.[1]

Claimant seeks relief under an ambiguously worded statute providing a grant of jurisdiction, the precise scope of which is at issue in this case and those companion cases pending before the Secretary. Section 210 of the Act, which authorizes DOL to investigate complaints of discrimination against employees involving activities under The Atomic Energy Act of 1954, has been reasonably construed by the three Administrative Law Judges in this office to apply only to licensees of the NRC, or applicants for such licenses, and their contractors and subcontractors, and not to apply to DOE or DOE's contractors and subcontractors. The Complainant has not advanced any argument which would cause me to reach a conclusion contrary to that of the three other judges.

[Page 4]

Section 210 of the Act provides in pertinent part:

> (a) No employer, *including* a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant, may discriminate against any employee with respect to his . . . employment because the employee . . . (1) commenced . . . (2) testified . . . or (3) assisted . . . in any proceeding . . . under [the] Act or the Atomic Energy Act of 1954 . . . .
> (b)(1) Any employee who believes that he has been . . . discriminated against by any person in violation of subsection (a) may . . . file a complaint with the Secretary of Labor . . . . Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint . . . and the *Commission*. (Emphasis supplied.)

The plain language of subsection (a) of the statute could be construed to apply to all employers, regardless of their relation to NRC, and thus to provide the protections that Claimant seeks, if the word "including" were construed to be illustrative, and not to limit application of the statutory prohibition exclusively to entities involved with the NRC. However, the reference to the "Commission" in subsection (b) suggests that the

subsection was intended to apply only to entities involved with the NRC, because notice to the "Commission" would have no apparent purpose if a complainant were related, as is this Complainant, to DOE but not to the NRC.

Although the word "including" in subsection (a) would normally be construed as illustrative, and not to limit application of the statutory prohibition solely to NRC licensees or applicants or their contractors and subcontractors, I conclude, in light of the context of the statute and its legislative history, as explicitly reviewed by Judge Guill and Judge Von Brand, that the statutory prohibitions were not intended apply generally to employers without the specified relationship to the NRC.

It is not disputed that the Savannah River Plant is a Government Owned Contractor Operated (GOCO) facility and not a licensee or license applicant of the NRC or a contractor or subcontractor of such a licensee or applicant. It is this distinction which lies at the heart of the unresolved

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ambiguity. Judge Guill points out that, so long as there has been government regulation of atomic energy, privately owned and operated atomic facilities have been treated differently from GOCO facilities, including being subject to separate governing regulations.

In brief, it appears that Congress enacted section 210 of the Act in the NRC Authorization Act of 1977, Pub. L. No. 95-601. The relevant text of the statute is codified in Title II of the Act, which governs only the NRC (as distinguished from Title I, which deals solely with DOE). Although the effectiveness of the protections are contested by Claimant, DOE has promulgated its own protective provisions for whistleblowers within its regulatory jurisdiction of which Congress may be assumed to have been aware when it enacted section 210 of the Act.

Moreover, the House Conference Report on the appropriations bill which enacted section 210 of the Act states explicitly, "The Senate bill amended the Energy Reorganization Act of 1974 to provide protection to employees of Commission licensees, applicants, contractors, or subcontractors from discharge or discrimination for taking part or assisting in administrative or legal proceedings of the Commission. . . The House amendment contained no similar provision, and the conferees agreed to the Senate provision." Conf. Rep. No. 95-1796, pp. 16-17; S. Rep. No. 95-848, pp. 29-30; 95th Cong., 1978 U.S. Code Cong. Ad. News, 7303-04, 7309 . Thus the inference is compelling that Congress intended this legislation to protect only employees at NRC-licensed facilities.

Clamant's reliance upon *Legal Environmental Assistance Foundation v. Hodel*, 586 F. Supp. 1163 (E.D. Tenn. 1984)*(L.E.A.F.*) for the proposition that DOE has, in effect, conceded DOL's jurisdiction over the administration of whistleblower provisions in

certain environmental legislation generally, is misplaced. *L.E.A.F.* dealt with the reconciliation of a comprehensive statutory program for handling hazardous wastes with an express limitation that the grant of authority not apply to any activity or substance subject to the Atomic Energy Act of 1954 (AEA), except to the extent that the application would not be inconsistent with the requirements of the AEA. The instant

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case, by contrast, poses the question of the extent of the initial grant of authority as determined by the particular terms of the statute. This circumstance militates against reliance upon possible analogies to other environmental statutes for the purpose of determining the scope of section 210.

Moreover, I find the authorities cited by Claimant with respect to cumulative remedies and primary jurisdiction of DOL inapposite to the operative considerations of this case. The mere fact that DOE had earlier adopted whistleblower regulations would not preempt application of section 210 to DOE, as Claimant suggests, if the statutory intent were clearly to the contrary. However, the fact that DOE's whistleblower regulations already existed, at a time when section 210 was enacted to provide protections which had not previously existed to entities involved with the NRC, lends credence to the proposition that, in the absence of explicit direction, the new legislation was not intended to supersede the existing arrangement governing whistleblowers at DOE. Accordingly, it is

ORDERED that the Motions of the respective parties to dismiss for lack of subject matter jurisdiction be granted, and that this appeal be dismissed. I therefore do not rule upon the motion of DOE for dismissal as a party, or the alternative motions of other parties. The Notice of Hearing dated July 7, 1988, is vacated.

EDWARD TERHUNE MILLER
Administrative Law Judge

[ENDNOTES]

[1]Deputy Chief Judge E. Earl Thomas granted a Motion To Dismiss for lack of subject matter jurisdiction in *Wensil* and *B.F. Shaw Company*, 86-ERA-15, on July 8, 1986. Judge Theodor P. Von Brand issued a Recommended Order of Dismissal dated October 16, 1987, in the consolidated cases docketed as *Wensil and Adams v. DOE and DOE, Office of Inspector General,* 87-ERA-45 and 87-ERA-46. Judge James L. Guill issued an Order Granting Motion To Dismiss on March 19, 1981, in *Adams* v. U.S. Department of Energy, *et al.*, 87-ERA-12. Those cases have been consolidated and are awaiting decision the Secretary.